



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2013-0778; FRL-9904-00-Region 9]

Disapproval of State Implementation Plan Revisions; Clark County, Nevada

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to disapprove revisions to the Clark County portion of the Nevada State Implementation Plan (SIP). The SIP contains state and local regulations necessary to meet requirements of the Clean Air Act (CAA or the Act). We are proposing to disapprove a submission that would revise the SIP to include affirmative defense provisions applicable to violations related to excess emissions during equipment startup, shutdown and malfunction (SSM) events. We are taking comments on this proposal and plan to follow with a final action.

DATES: Any comments must arrive by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit comments, identified by docket number EPA-R09-OAR-2013-0778, by one of the following methods:

1. Federal eRulemaking Portal: www.regulations.gov. Follow the on-line instructions.
2. E-mail: steckel.andrew@epa.gov.
3. Mail or deliver: Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901.

Instructions: All comments will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through www.regulations.gov or e-mail. www.regulations.gov is an “anonymous access” system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: Generally, documents in the docket for this action are available electronically at www.regulations.gov and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at www.regulations.gov, some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Idalia Perez, EPA Region IX, (415) 972-3248, perez.idalia@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document “we,” “us,” and “our” refer to EPA.

Outline

- I. The State's Submittal
 - A. What regulation did the State submit?
 - B. Are there other versions of the submitted regulation?
 - C. What is the purpose of the submitted regulation?
 - D. What does the submitted regulation provide?
- II. EPA's Evaluation Criteria
 - A. General framework for state submittal and EPA review of SIP revisions
 - B. Specific framework for evaluating SIP provisions regarding excess emissions
 - C. What documents did we use in our evaluation?
- III. EPA's Evaluation and Action
 - A. Does the regulation meet the evaluation criteria?
 - B. EPA recommendations to improve the regulation
 - C. Proposed action and public comment
- IV. Statutory and Executive Order Reviews

I. The State's Submittal

- A. What regulation did the State submit?

Table 1 identifies the section of the Clark County Air Quality Regulations (CCAQR) proposed for disapproval, with the dates that it was amended by the Clark County Board of Commissioners (CCBC) and submitted to EPA on behalf of the Clark County Department of Air Quality and Environmental Management (DAQEM) by the State of Nevada Division of Environmental Protection (NDEP).

Table 1 - Submitted Regulation

Local Agency	Regulation Number and Title	Amended	Submitted
DAQEM	Section 25: Affirmative Defense for Excess Emissions Due to Malfunctions, Startups, and Shutdown	May 18, 2010	September 1, 2010

On March 1, 2011, NDEP's September 1, 2010 submission was deemed complete by operation of law, pursuant to CAA section 110(k)(1).

The CCBC also decided to adopt or amend other sections of the CCAQR, primarily addressing air pollution permit procedures, at the same May 18, 2010 CCBC hearing, and included these revisions in the same September 1, 2010 SIP submission. EPA has already taken action upon the other revisions in the September 1, 2010 SIP submission. EPA proposed a limited approval and limited disapproval of these other revisions on July 24, 2012 (77 FR 43206) and finalized the limited approval and limited disapproval on October 18, 2012 (77 FR 6403). EPA did not address the revisions to CCAQR Section 25 in the July 24, 2012 proposal or October 18, 2012 final action. Today's action addresses the remaining portion of NDEP's September 1, 2010 submission, specifically CCAQR Section 25.

B. Are there other versions of the submitted regulation?

We are not certain when CCBC originally adopted Section 25, but CCBC has amended it at the local level many times, most recently on May 18, 2010.¹ EPA has not previously approved a version of Section 25 into the Nevada SIP.² Therefore, the May 18, 2010 version of Section 25 is a new submittal to the SIP and is not replacing or amending pre-existing requirements already

¹ "CCAQR Section 25: Affirmative Defense for Excess Emissions Due to Malfunctions, Startups, and Shutdown," as adopted by CCBC on May 18, 2010, page 25-4.

² CCBC previously submitted a version of Section 25, which EPA disapproved on March 20, 1984. See 49 FR 10259, March 20, 1984 (previous disapproval of Clark Section 25). See also 69 FR 54006 at 54007 and 54018, September 7, 2004 (partial approval/disapproval of Clark New Source Review program); 77 FR 14862 at 14884, March 13, 2012 (revised format for Nevada SIP incorporation by reference); and 40 CFR 52.1483.

approved into the SIP. EPA is today reviewing only the May 18, 2010 version of Section 25 and the relevant materials associated with it that were included in NDEP's September 1, 2010 SIP submittal.

C. What is the purpose of the submitted regulation?

Section 25 and the other CCAQR sections submitted on September 1, 2010 are part of DAQEM's overall program intended to control the health and environmental impacts of air pollution. Specifically, CCAQR Section 25 describes the procedures by which air pollution sources may assert an affirmative defense for violations that result from excess emissions due to SSM events. CAA Section 110 describes procedures for States to develop and submit various air pollution regulations to EPA as part of SIP revisions. EPA interprets the CAA to authorize a state to elect to create narrowly drawn affirmative defense provisions applicable to malfunctions, consistent with EPA guidance. Accordingly, the Section 25 provision submitted by Clark County is not required by the CAA, but may be submitted to EPA under CAA section 110(a).

D. What does the submitted regulation provide?

CCAQR Section 25 establishes affirmative defenses applicable to violations that result from excess emissions. Section 25.1 states that affirmative defenses for certain excess emissions are available in the case of violations of all emission standards and limitations, except those specifically listed in Section 25.1.1(a) through (d), which are primarily emission limits or standards related to federal requirements under the CAA. For example, EPA interprets the exceptions from 25.1.1(a) to provide that Section 25 does not operate to create any affirmative defense applicable to violations of any EPA standards promulgated pursuant to CAA section 111.

Section 25.2 states that emissions in excess of emission limits that were caused by equipment malfunction constitute a violation. However, a source is provided an affirmative defense from civil and administrative enforcement (except injunctive relief) for these violations if it meets the reporting requirements in Section 25.6 and demonstrates compliance with Sections 25.2.1(a) through (j), which require that: (a) the excess emissions resulted from a sudden and unavoidable equipment breakdown beyond reasonable control; (b) equipment was well maintained and operated; (c) equipment was repaired expeditiously; (d) excess emissions were minimized; (e) excess emission impacts were minimized; (f) there was no recurring pattern of excess emissions; (g) ambient air quality standards were not exceeded; (h) the excess emissions could not have been foreseen or avoided; (i) emission monitoring systems were operated if practicable; and (j) the response to the excess emissions was documented by contemporaneous records.

Section 25.3 similarly states that emissions in excess of emission limits that were caused by equipment startup and shutdown constitute a violation. However, a source is provided an affirmative defense from civil and administrative enforcement (except injunctive relief) for these violations if it meets the reporting requirements in Section 25.6 and demonstrates compliance with Sections 25.3.1(a) through (h), which require that: (a) the excess emissions could not have been prevented through prudent planning and design; (b) if the excess emissions resulted from a bypass of control equipment, the bypass was unavoidable to prevent loss of life, personal injury or severe property damage; (c) equipment was well maintained and operated; (d) excess emissions were minimized; (e) excess emission impacts were minimized; (f) ambient air quality standards were not exceeded; (g) emission monitoring systems were operated if practicable; and (h) the response to the excess emissions was documented by contemporaneous records. Section

25.3.2 notes that if excess emissions occur during scheduled startup and shutdown, then those instances shall be treated as other malfunctions subject to Section 25.2.

Section 25.4 states that if excess emissions occur due to a malfunction during scheduled maintenance, then that exceedance will be treated the same as other malfunctions subject to 25.2.

To obtain an affirmative defense, Section 25.5 requires sources to demonstrate, through information required by Section 25.6, that all reasonable measures were implemented to prevent the excess emissions.

Section 25.6 requires air pollution sources to report to DAQEM regarding emissions in excess of permit limits by: (a) a notification within 24 hours of learning of the excess emissions; and (b) a report containing the information required by Section 25.6.3 within 72 hours of the initial notification. Section 25.6.2 accelerates these reporting deadlines where emissions pose imminent and substantial danger. Section 25.6.3 specifies that the report must describe the emissions including: (a) location; (b) magnitude; (c) time and duration; (d) type of equipment; (e) cause; (f) steps taken to remedy and prevent future malfunction; (g) steps taken to limit emissions; and (h) steps taken to comply with applicable permit procedures. In the case of continuing or recurring excess emissions, Section 25.6.4 states that the notification requirements in Sections 25.6.1 and 25.6.2 will be satisfied if the source provides notification after excess emissions are first detected and includes in the notification an estimate of the time the excess emissions will continue.

II. EPA's Evaluation Criteria

A. General framework for state submittal and EPA review of SIP revisions

Under the principle of cooperative federalism, both states and EPA have authorities and responsibilities under the CAA with respect to SIPs. Pursuant to CAA section 109, 42 USC

7409, EPA promulgates National Ambient Air Quality Standards (NAAQS) for criteria pollutants, the attainment and maintenance of which are considered requisite to protect the public health and welfare. CAA section 107(a) assigns states the primary responsibility for assuring that the NAAQS are attained and maintained, and CAA section 110(a)(1), 42 USC 7410(a)(1), requires states to develop and submit to EPA, SIPs which provide for NAAQS implementation, maintenance, and enforcement. CAA section 110(a)(2), 42 USC 7410(a)(2), requires each SIP to meet the requirements listed in section 110(a)(2)(A) through (M).

In developing SIPs, states have broad authority to develop the mix of emission limitations they deem best suited for the particular situation, but this discretion is not unbridled. Under CAA section 110(k), EPA is required to determine whether or not SIP submissions in fact meet all applicable requirements of the Act. EPA is authorized to approve, disapprove, partially approve and partially disapprove, or conditionally approve each SIP submission, as appropriate. When a SIP submission does not meet the applicable requirements of the CAA, EPA is obligated to disapprove it, in whole or in part, as appropriate.

CAA sections 110(l) and 193 impose additional requirements upon EPA when reviewing a state's proposed SIP revision. CAA section 110(l), 42 USC 7410(l), provides that EPA may not approve a SIP revision if it "would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of this chapter." In addition, CAA section 193 prohibits SIP revisions that would affect control measures in effect prior to the 1990 CAA amendments in any area that is designated nonattainment for any NAAQS, unless the modification insures equivalent to greater emission reductions of such air pollutant.

B. Specific framework for evaluating SIP provisions regarding excess emissions

The general framework summarized above underlies EPA's evaluation of SIP submissions as they relate to provisions related to excess emissions. EPA has a longstanding interpretation of the CAA with respect to the treatment in SIPs of excess emissions during SSM events. Central to EPA's interpretation are the definitions of "emission limitation" and "emission standard" contained in CAA section 302(k), 42 USC 7602(k), which are defined as limitations that must be met on a continuous basis. Under CAA section 110(a)(2)(A), 42 USC 7410(a)(2)(A), each SIP must include enforceable emission limitations and other control measures as may be necessary or appropriate to meet applicable CAA requirements. In addition, under CAA section 110(a)(2)(C), 42 USC 7410(a)(2)(C), each SIP must provide for the enforcement of the measures described in CAA section 110(a)(2)(A) and provide for the regulation of sources as necessary to ensure the attainment and maintenance of the NAAQS and protection of Prevention of Significant Deterioration (PSD) increments.

While the CAA requires that emission limitations in a SIP must be met on a "continuous" basis, practical realities or circumstances may create difficulties in meeting a legally required emission limit continuously 100% of the time. Case law holding that technology-based standards should account for the practical realities of technology supports EPA's view that an enforcement program under a SIP that incorporates some level of flexibility is reasonable and consistent with the overall intent of the CAA.³ While EPA views all excess emissions as violations of emission limitations or emission standards, we recognize that, in certain situations, imposition of a civil penalty for sudden and unavoidable malfunctions caused by circumstances entirely beyond a source's control may not be appropriate.

³ See, e.g., *Essex Chemical v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973); and *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

In addressing excess emissions due to sudden and unavoidable malfunctions, EPA has provided guidance on three approaches states may elect to use: (1) traditional enforcement discretion; (2) SIP provisions that address the exercise of enforcement discretion by state personnel; and (3) SIP provisions that provide a narrowly tailored affirmative defense to civil penalties. Under the first approach, the State (or another entity, such as EPA, seeking to enforce a violation of the SIP) may consider the circumstances surrounding the event in determining whether to pursue enforcement. Under the second approach, states may elect to create SIP provisions that provide parameters for the exercise of enforcement discretion by state personnel, so long as they do not adversely affect enforcement by EPA or citizens. Under the third approach, states may elect to create SIP provisions that establish an affirmative defense that may be raised by the defendant in the context of an enforcement proceeding for civil penalties (not injunctive relief), if the defendant has proven that certain criteria have been met.

Most relevant to this action, EPA interprets the CAA to allow SIP provisions that provide an affirmative defense, so long as they are appropriately drawn. EPA has issued guidance specifically concerning affirmative defense provisions in SIPs.⁴ EPA guidance recommends criteria that it considers necessary to assure that the affirmative defense is consistent with CAA requirements for SIP provisions. EPA believes that narrowly-tailored affirmative defense provisions can supply flexibility both to ensure that emission limitations are “continuous” as required by CAA section 302(k), because any violations remain subject to a claim for injunctive

⁴ See Memorandum dated September 20, 1999, from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation, entitled “State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown” (“1999 Policy”), pg. 3 of the Attachment. EPA notes that at the time of the 1999 SSM Policy, EPA interpreted the CAA to allow such affirmative defense provisions not only in the case of malfunctions, but also in the case of startup and shutdown. For the reasons explained later in this proposal, EPA no longer interprets the CAA to permit affirmative defense provisions for events other than malfunctions, because it believes that sources should be expected to meet applicable emission limits during normal modes of source operation or for appropriate alternative emission limits to apply during such normal modes of source operation.

relief, and to provide limited relief for penalties for malfunctions that are beyond the source's control where the source has taken necessary steps to minimize the likelihood and extent of any such violation. Several courts have agreed with this approach.⁵ Neither the enforcement discretion nor the affirmative defense approaches may waive reporting requirements for the violation. States are not required to employ an affirmative defense approach, but if they choose to do so, EPA will evaluate the state's SIP provisions for consistency with the Act as interpreted by our policy and guidance, including those documents listed in section II.C below.

In CCAQR Section 25 as submitted, DAQEM has elected to create an affirmative defense provision applicable to excess emissions for SSM events. EPA acknowledges that DAQEM attempted to develop these affirmative defenses in NDEP's September 1, 2010 SIP submittal consistent with EPA guidance at that time. However, EPA has reexamined its interpretation of the CAA with respect to affirmative defenses and accordingly believes that such affirmative defenses are only appropriate in the case of unplanned events like malfunctions, not in the case of planned events such as startup and shutdown for which sources should be expected to comply with applicable SIP emission limitations. Under CAA sections 110(k) and 110(l), EPA is obligated to determine whether SIP submissions in fact meet CAA requirements and our interpretation of the Act at the time EPA takes action on a SIP submission.

C. What documents did we use in our evaluation?

EPA's interpretation of the Act as it applies to SIP provisions that address excess emissions occurring during SSM periods is set forth in a series of guidance documents. These include: (1) a memorandum dated September 28, 1982, from Kathleen M. Bennett, Assistant

⁵ See, *Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013) (upholding the EPA's approval of an affirmative defense applicable during malfunctions in a SIP submission as a permissible interpretation of the statute under Chevron step 2 analysis), *cert denied*, 187 L. Ed. 2d 45 (October 7, 2013); *Mont. Sulphur & Chemical Co. v. EPA*, 666 F.3d 1174 (9th Cir. 2012); and *Ariz. Public Service Co. v. EPA*, 562 F.3d 1116, 1130 (9th Cir. 2009).

Administrator for Air, Noise, and Radiation, entitled “Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions” (1982 Policy); (2) a memorandum dated February 15, 1983, from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation, also entitled, “Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions” (1983 Policy); (3) a memorandum dated September 20, 1999, from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation, entitled “State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown” (1999 Policy); and (4) a memorandum dated December 5, 2001, from Eric Schaeffer, Director, Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance, and John S. Seitz, Director, Office of Air Quality Planning and Standards, Office of Air and Radiation, entitled, “Re-Issuance of Clarification – State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown” (2001 Policy).

EPA’s interpretation of the CAA with respect to SIP provisions that address excess emissions during SSM events has been applied in rulemaking, including, but not limited to: (1) EPA’s “Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities,” 75 FR 68989 (Nov. 10, 2010); (2) EPA’s “Federal Implementation Plan for the Billings/Laurel, MT, Sulfur Dioxide Area,” 73 FR 21418 (Apr. 21, 2008); and (3) EPA’s “Finding of Substantial Inadequacy of Implementation Plan: Call for Utah State Implementation Plan Revision,” April 18, 2011 (76 FR 21639).

In addition, EPA recently issued a proposal in response to a petition for rulemaking concerning CAA requirements for SIP provisions that address excess emissions, reiterating

EPA's interpretation of the CAA with respect to such provisions.⁶ In this recent action, EPA specifically addressed the CAA requirements with respect to SIP provisions that provide an affirmative defense for violations of emission limitations due to excess emissions during SSM events.

A copy of each document listed in this section is available in the docket for this rulemaking.

III. EPA's Evaluation and Action

A. Does the regulation meet the evaluation criteria?

NDEP's September 1, 2010 submission of CCAQR Section 25 fails to meet the evaluation criteria in at least two significant respects.

First, Sections 25.1 and 25.3 are inconsistent with the requirements provided in CAA section 110(a) and conflict with the fundamental enforcement structure provided in CAA sections 113 and 304, because they create an affirmative defense for violations due to excess emissions during startup and shutdown. EPA believes that providing affirmative defenses for avoidable violations, such as those resulting from excess emissions during planned events such as startups and shutdowns, that are within the source's control, is inconsistent with the requirements provided in CAA section 110(a) and the fundamental enforcement structure

⁶ See State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, February 22, 2013 (78 FR 12460) ("February 22, 2013 Proposed SSM SIP Calls"); see also EPA's February 4, 2013 Statutory, Regulatory, and Policy Context Memorandum for the February 22, 2013 Proposed SSM SIP Calls.

provided in CAA sections 113 and 304,⁷ which provide for potential civil penalties for violations of SIP requirements.⁸

By contrast, SIP provisions providing affirmative defenses can be appropriate for malfunctions because, by definition and unlike planned startups and shutdowns, malfunctions are unforeseen and could not have been avoided by the source, and the source will have taken steps to prevent the violation and to minimize the effects of the violation after it occurs. In such circumstances, EPA interprets the Act to allow narrowly drawn affirmative defense provisions that may provide relief from civil penalties (but not injunctive relief) to sources, when their conduct justifies this relief.⁹ Such is not the case with planned and predictable events, such as startups and shutdowns, during which sources should be expected to comply with applicable SIP emission limitations and should not be accorded relief from civil penalties if they fail to do so.¹⁰ Providing an affirmative defense for monetary penalties for violations that result from planned events is inconsistent with the basic premise that the excess emissions were beyond the source's control, and thus is diametrically opposed to the intended purpose of such an affirmative defense to encourage better compliance even by sources for which 100% compliance is not possible.

Second, the criteria for obtaining an affirmative defense for excess emissions during malfunctions in CCAQR Section 25.2 are not fully consistent with CAA requirements. EPA has guidance making recommendations for criteria appropriate for affirmative defense provisions that would be consistent with the CAA. EPA's 1999 Policy and the February 22, 2013 Proposed

⁷ See, *Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013) (upholding the EPA's approval of an affirmative defense applicable during malfunctions in a SIP submission as a permissible interpretation of the statute under Chevron step 2 analysis), *cert denied*, 187 L. Ed. 2d 45 (October 7, 2013); See also, EPA's February 22, 2013 Proposed SIP Calls (78 FR 12460, 12480).

⁸ See EPA's February 22, 2013 Proposed SIP Calls (78 FR 12460, 12480).

⁹ See EPA's February 22, 2013 Proposed SIP Calls (78 FR 12460, 12478).

¹⁰ EPA notes that a state can elect to adopt alternative emission limitations that apply to normal modes of source operation, such as startup and shutdown, so long as these provisions are consistent with CAA requirements. EPA's February 22, 2013 Proposed SSM SIP Calls provides guidance on how such SIP provisions may be developed to meet CAA requirements.

SSM SIP Call lay out these criteria. These are guidance recommendations and states do not need to track EPA's recommended wording verbatim, but states should have SIP provisions that are consistent with these recommendations in order to assure that the affirmative defense meets CAA requirements. The affirmative defense criteria set forth in Section 25.2.1 are not sufficiently consistent with these recommended criteria for affirmative defense provisions in SIPs for malfunctions.

Specifically, EPA's guidance notes that affirmative defenses are "not appropriate for areas and pollutants where a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments."¹¹ CCAQR Section 25.2.1(g) states that sources with emissions in excess of an applicable emission limitation due to a malfunction have an affirmative defense if the source has demonstrated (among other things) that "During the period of excess emissions there were no exceedances of the relevant ambient air quality standards established in Section 11 that could be attributed to the emitting source." This deviates from EPA's guidance because CCAQR Section 11.2 was adopted and submitted in 2003 and lists "relevant ambient air quality standards" that do not account for all of the NAAQS promulgated since the regulation was approved into the SIP in 2004.¹² As a result, CCAQR Section 25.2 would allow an affirmative defense for an exceedance of an applicable emission limitation even if that exceedance violated a NAAQS that is not listed in CCAQR Section 11.2.¹³

In addition, Section 25.2.1(g) is not fully consistent with CAA requirements because it fails to include consideration of the impacts of excess emissions during a malfunction on the PSD increments. As noted above, Section 25.2.1(g) only mentions the relevant ambient air

¹¹ See page 3 of the Attachment to EPA's 1999 Policy on SSM events.

¹² See CCAQR Section 11.2, "Ambient Air Quality Standards," adopted by CCBC on 10/7/03, submitted by NDEP to EPA on 10/23/03, and approved by EPA on 9/7/04 (69 FR 54006); 40 CFR 50.4-50.13.

¹³ See, e.g. the 24-hour standard for PM_{2.5} of 65 µg/m³ in CCAQR Section 11.2, which is inconsistent with the 24-hour standard set on October 17, 2006 of 35 µg/m³ (71 FR 61144).

quality standards in Section 11, and Section 11 also does not mention the PSD increments. SIP requirements are not limited to those specific requirements for designated nonattainment areas; SIPs must also meet requirements related to PSD in attainment areas. Similarly, SIP provisions addressing affirmative defense provisions cannot be limited exclusively to impacts on nonattainment areas.

B. EPA recommendations to improve the regulation

CCAQR Section 25.6 requires sources to provide information to DAQEM regarding excess emissions caused by SSM. Such reporting would enable DAQEM to review, evaluate, and utilize the information as a tool in its air quality planning and management efforts and help provide for attainment and maintenance of the NAAQS and other applicable requirements of the Act. This reporting would also facilitate effective enforcement, if appropriate. As a result, while it is not appropriate at this time for EPA to separately approve Section 25.6 as submitted in context of the overall Section 25, EPA would support a SIP revision creating such reporting requirements, independent of the problematic affirmative defense provisions elsewhere in Section 25.

As stated in Section II.B and elsewhere above, EPA interprets the CAA to allow only narrowly drawn affirmative defense provisions that are available for events that are entirely beyond a source's control. Thus, an affirmative defense may be appropriate for events like malfunctions, which are sudden and unavoidable events that cannot be foreseen or planned for. The underlying premise for an affirmative defense provision is that the source is properly designed, operated and maintained, and could not have taken action to prevent the exceedance. Because a qualifying source could not have foreseen or prevented the event, the affirmative defense is available to provide relief from monetary penalties that could result from an event

beyond a source's control. Therefore, it may be possible for DAQEM to revise Section 25 to provide an affirmative defense for malfunctions consistent with CAA requirements, as recommended in EPA's SSM Policy.

The legal and factual basis supporting the concept of an affirmative defense for malfunctions does not support providing an affirmative defense for normal modes of operation like startup and shutdown. Such events are planned and predictable. Sources should be designed, operated, and maintained to comply with applicable emission limitations during normal and predictable source operation. Because startup and shutdown periods are part of a source's normal operations, the same approach to compliance with, and enforcement of, applicable emission limitations during those periods should apply as otherwise applies during a source's normal operations. If justified, the state can develop and submit to EPA for approval as part of the SIP, alternative emission limitations or control measures that apply during startup and shutdown, if a source cannot meet the otherwise applicable emission limitations in the SIP.

However, even if a source is a suitable candidate for alternative SIP emission limitations during startup and shutdown, that does not justify the creation of an affirmative defense in the case of excess emissions during such events. Because these events are planned, EPA believes that sources should be able to comply with applicable emission limitations during these periods of time. To provide an affirmative defense for violations that occur during planned and predictable events for which sources should have been expected to comply is tantamount to providing relief from civil penalties for a planned violation. Accordingly, EPA recommends that NDEP should eliminate the affirmative defense provisions in Section 25 applicable to startup and shutdown.

C. Proposed action and public comment

As discussed in Section II.B and elsewhere above, affirmative defense provisions that include periods of normal source operation that are within a source's control, such as planned startup and shutdown, are inconsistent with the requirements of CAA section 110(a) and the enforcement structure provided in CAA sections 113 and 304. Therefore, the affirmative defense provision for excess emissions during startup and shutdown created in Sections 25.1, 25.3 and elsewhere in CCAQR Section 25 do not meet CAA requirements for SIPs. In addition, the affirmative defense provisions for malfunctions in Section 25.2 do not fully comply with the CAA as discussed in Section III.A above, and thus also do not meet CAA requirements.

As authorized in CAA section 110(k)(3), we are proposing to disapprove CCAQR Section 25 in NDEP's September 1, 2010 SIP submission because of the deficiencies discussed in section III.A above. Affirmative defenses for excess emissions and other elements of Section 25 are not required by the Act, and the lack of affirmative defenses for excess emissions does not make a SIP deficient. Therefore, if this disapproval is finalized as proposed, there would be no CAA sanction implications as described in CAA section 179 and 40 CFR 52.31, and no Federal Implementation Plan (FIP) implications as described in CAA section 110(c).

We will accept comments from the public on this proposed disapproval for the next 30 days.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This proposed action is not a "significant regulatory action" subject to review by the Office of Management and Budget (OMB) under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under EO 12866 and EO 13563 (76 FR

3821, January 21, 2011).

B. Paperwork Reduction Act

This proposed action does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 USC 3501 et seq.) because this proposed action under CAA section 110 will not in and of itself create any new information collection burdens but simply disapproves certain State requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA, 5 USC 601 et seq.) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.¹⁴ This proposed SIP disapproval under section 110 and subchapter I, part D of the CAA will not have a significant impact on a substantial number of small entities because it will not create any new requirements but simply disapproves certain State requirements for inclusion in the SIP. Accordingly, it affords no opportunity for EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule. Therefore, I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The CAA forbids EPA to base its

¹⁴ Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of this notice on small entities, small entity is defined as: (1) a small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards (see 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

actions concerning SIPs on such grounds. *Union Electric Co., v. U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 USC 7410(a)(2).

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, 2 USC 1531–1538), for State, local, or tribal governments or the private sector. EPA has determined that the proposed disapproval action does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This action proposes to disapprove pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132 - Federalism

EO 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in EO 13132 to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

This proposed action does not have Federalism implications as specified in EO 13132. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in EO 13132, because it merely disapproves certain State

requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Thus, EO 13132 does not apply to this action.

F. Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications, as specified in EO 13175 (65 FR 67249, November 9, 2000). In this action, EPA is not addressing any tribal implementation plans. This action is limited to Clark County, Nevada, and the SIP provisions which are the subject of the proposed action do not apply to sources of emissions located in Indian country. Thus, EO 13175 does not apply to this action. However, EPA invites comment on this proposed rule from tribal officials.

G. Executive Order 13045 - Protection of Children from Environmental Health Risks and Safety Risks

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of EO 13045 has the potential to influence the regulation. This proposed action is not subject to EO 13045 because it is not an economically significant regulatory action based on health or safety risks subject to EO 13045. This proposed action under section 110 and subchapter I, part D of the CAA will not in and of itself create any new regulations but simply disapproves certain State requirements for inclusion into the SIP.

H. Executive Order 13211 - Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This proposed action is not a "significant energy action" as defined in EO 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution

or use of energy. This proposed action under section 110 and subchapter I, part D of the CAA will not in and of itself create any new regulations, but simply disapproves certain State requirements for inclusion into the SIP.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law 104–113, section 12(d) (15 USC 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

EPA believes that this proposed action is not subject to requirements of section 12(d) of NTTAA because application of those requirements would be inconsistent with the CAA. We also note that this proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898 - Federal Actions to Address Environmental Justice in

Minority Populations and Low-Income Populations

EO 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or

environmental effects of their programs, policies and activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address environmental justice in this proposed action. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the CAA. Accordingly, this action merely proposes to disapprove certain State requirements for inclusion into the SIP under section CAA 110 and will not in and of itself create any new requirements.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, State implementation plan, Volatile organic compounds.

AUTHORITY: 42 U.S.C. 7401 *et seq.*

Dated: November 26, 2013.

Jared Blumenfeld,
Regional Administrator,
Region IX.